No. 21802

In the

United States Court of Appeals

For the Ninth Circuit

MARICOPA TALLOW WORKS, INC., W. J. Gieszl, Thomas E. Lewis, Ned Lewis, T. L. Bergen, Robert L. Poer, and Anaheim Citrus Products Co., Inc.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellants

LEWIS ROCA SCOVILLE
BEAUCHAMP & LINTON

By JOHN P. FRANK
JOHN J. FLYNN
PAUL G. ULRICH

114 West Adams Street
Phoenix, Arizona 85003

Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES AND RULES

OTHER

No. 21802

In the

United States Court of Appeals

For the Ninth Circuit

MARICOPA TALLOW WORKS, INC., W. J. Gieszl, Thomas E. Lewis, Ned Lewis, T. L. Bergen, Robert L. Poer, and Anaheim Citrus Products Co., Inc.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellants

JURISDICTION

This matter arises in connection with a Grand Jury proceeding at Phoenix, Arizona. Appellant Maricopa Tallow Works, Inc. was subpoenaed duces tecum and filed a motion to quash; the other appellants intervened in these proceedings and asserted their individual privilege against self-incrimination and their claim to immunity. An order denying the motion to quash in part and granting it in part was entered on December 6, 1966 (R. 35-36), but was later reversed by the district court in relevant particulars on Feb-

ruary 8, 1967. (R. 112-13). The district court thereupon entered a stay of its order pending appeal to this Court (R. 138). The Notice of Appeal was filed on February 28, 1967 (R. 114) and a bond for costs on appeal was posted on February 28, 1967 (R. 115). This Court has jurisdiction under 28 U.S.C. sec. 1291.

STATEMENT OF THE CASE

This matter has arisen in the course of an antitrust Grand Jury investigation of the hide, dead stock, and tallow industry. On November 21, 1966 (R. 29) the Government caused a subpoena duces tecum to be issued to Maricopa Tallow Works, Inc., an Arizona corporation, directing that certain designated corporate records be produced for Grand Jury inspection purposes. The subpoena demanded production of records relating to ownership of the corporation, the volume and prices of materials bought and sold by the corporation, division or allocation of suppliers of material, and stabilization of prices to be paid for materials, as well as records relating to Bootstrap Trading Company, a competitor in the industry, and Emil Kohn, its owner. (R. 29-34).

Maricopa Tallow is an extremely closely held corporation. From 1960-1965, four persons each held approximately 25 percent of its stock, and these same men were also the corporate directors and officers. (R. 11). In June, 1965, two of these four persons terminated as shareholders, and were replaced by a corporation and by another individual owner, who is presently secretary-treasurer of the corporation. The corporate owner holds less than one quarter of the stock (R. 11); three individuals own the great majority of shares. This small group of directors and officers has been for practical purposes the working staff of the concern

throughout the period to which the subpoena was directed, 1960 to date.

1. The Subpoena and the Motions.

The subpoena of November 21, 1966, called very comprehensively for the records of the corporation and, for that matter, numerous personal papers which were not records of the corporation. (R. 29-34). On December 2, 1966, Maricopa Tallow moved to quash the subpoena on grounds of its claimed privilege against self-incrimination (R. 4).

At the same time, the six present and former shareholders, officers, and directors of Maricopa Tallow filed two motions of their own. First, they asked leave to be permitted to intervene on behalf of the corporation with respect to the motion to quash (R. 1). Second, they also moved to quash the subpoena directed to the corporation on the ground that the subpoena violated the grant of immunity of 15 U.S.C. Secs. 32-33 as to them individually, and on the further ground that it violated their individual privilege against self-incrimination (R. 4).

2. Proceedings Below: The First Orders.

On December 6, 1966, the district court, after extensive argument and briefing, granted the motion of the shareholders, officers, and directors for leave to intervene. (R. 35). The motion to quash was granted insofar as the subpoena required the production of personal papers; the scope of the materials required to be produced was limited to the corporate records of the corporation (R. 35).

There followed paragraph 3 of the Order, which is the substance of the present controversy. In that paragraph the district court held:

"3. With respect to the materials furnished to the Grand Jury by reason of the subpoena heretofore issued, it is ordered that these materials may only be used for purposes of investigating possible criminal activity on the part of Maricopa Tallow Works, Inc. and may not be used for the purpose of investigating any possible criminal activity on the part of any of the above named individuals." (R. 35-36).

3. Proceedings Below: Modification of the Order.

On the Government's Motion for Modification (R. 37) the trial court struck paragraph 3 of the Order.[1] The essential issue in respect to paragraph 3 is the weight and treatment to be given to the decision of this Court in *Wild v. Brewer,* 329 F.2d 924 (9th Cir. 1964), in relation to more recent decisions of the United States Supreme Court. It appeared to the district court on rehearing that *Wild v. Brewer* controlled the instant case (R. 112). If the view of the majority in *Wild v. Brewer* were to prevail, then there was strong argument to delete paragraph 3. If the view of Judge Madden in dissent were to prevail, then the court had been right in the first time. There was no issue below as to whether the district court should follow the law; of course it should. But there was a very substantial question as to whether with the passage of time, and with additional decisions on the subject of self-incrimination, the dissenting view in *Wild v. Brewer* had gained in strength and persuasiveness.

In addition, appellants argued in the district court both at the time of hearing on the motion to quash and on the

---

1. A member of the district court bar, Robert C. Hackett, Esq., who stated at the time of argument of this motion that he represented Bootstrap Trading Co., a competitor of Maricopa Tallow, (Hearing on modification Tr. 4), was allowed to appear amicus on this issue. (R. 144).

Government's motion for modification that *Wild v. Brewer* was not controlling because that case did not consider the propriety of an order directing that the corporate records be produced but that their use be limited to investigations directed towards persons other than the intervenors. (Hearing on motion to quash Tr. 8-9, 16-21; hearing on motion to modify Tr. 17-28). The Government agreed. (Hearing on motion to quash Tr. 21-22).

4. This Appeal and the Stay.

An appeal was promptly taken. In view of the substantial questions presented as to the scope of the privilege against self-incrimination and the immunities under the antitrust laws, the district court granted a stay pending the appeal. For details and record references, see the Jurisdictional Statement above.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, amendment V:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."

15 U.S.C. sec. 32:

> "No persons shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under sections 1-7 of this title and all Acts amendatory thereof or supplemental thereto, and sections 8-11 of this title: Provided, That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying."

15 U.S.C. sec. 33:

> "Under the immunity provisions in section 32 of this title, immunity shall extend only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath."

SPECIFICATION OF ERRORS RELIED UPON

1. The district court erred in denying the motion of appellant Maricopa Tallow Works, Inc. to quash a subpoena requiring production of certain corporate records of that corporation, for the reason that the test of whether a corporation may claim the privilege against self-incrimination under the fifth amendment should be that applied in *United States v. White,* 322 U.S. 694, 64 S.Ct. 1248, 88 L.Ed. 1542 (1944), and under that test, appellant Maricopa Tallow Works, Inc., is entitled to assert the privilege.

2. The district court erred in denying the motion of the individual appellants to quash the subpoena directed to Maricopa Tallow Works, Inc. for the reason that the denial of that motion invades the immunity granted to them under 15 U.S.C. secs. 32-33 and further is an invasion of their privilege against self-incrimination.

3. Assuming that the district court properly entered paragraph 3 of its order of December 6, 1966, limiting the use to which the records of appellant Maricopa Tallow Works, Inc., could be put, the district court erred in granting the motion of the United States for modification of its order by deleting that paragraph. The failure to limit the use to which the corporate records obtained under this subpoena could be put violates immunity given to the individual appellants under 15 U.S.C. secs. 32-33 and invades their privilege against self-incrimination.

4. The district court erred in holding that appellants could not claim their privilege against self-incrimination as to records sought to be produced by the subpoena issued to appellant Maricopa Tallow Works, Inc. for the reason that the subpoena invades both the corporations' and the individuals' privilege against self-incrimination.

QUESTIONS PRESENTED

1. Must a closely held corporation produce records under a Grand Jury subpoena where the records necessarily involve its small number of shareholders and officers without extending to those individuals full privileges under the self-incrimination clause of the fifth amendment and under the immunity provisions of the antitrust laws, where those shareholders and officers directly and actively participate in the management of the corporation?

2. Where records of a closely held corporation are subpoenaed in an antitrust investigation, have the small number of shareholders and officers necessarily involved in all corporate affairs a right to protection of their rights against self-incrimination as to their statutory immunity in connection with the subpoena?

3. In connection with Question 2, may a court properly limit the use of the materials produced to insure protection of the privilege against self-incrimination of individual shareholders and officers and to safeguard the immunity provided by the antitrust statutes?

SUMMARY OF ARGUMENT

The issue presented by this case is whether a small, closely-held corporation and its officers, shareholders and directors may claim the fifth amendment privilege against self-incrimination so as to oppose successfully the produc-

tion of records of the corporation demanded by the Government during an antitrust investigation. 15 U.S.C. secs. 32-33 provide immunity for persons who testify or produce evidence in response to a subpoena in connection with such an investigation. To hold that these same persons may not claim the identical privilege and immunity when their closely-held corporation is itself subpoenaed is to substitute a totally unrealistic legal fiction for the expanding spirit in which the privilege against self-incrimination has been interpreted.

The immunity provided by 15 U.S.C. secs. 32-33 should not be evaded by the device of seeking documents directly from the corporation itself that would tend to incriminate the individual appellants. As did Judge Madden in *Wild v. Brewer,* 329 F.2d 924, 925 (9th Cir. 1964) (dissenting opinion), the question of whether the corporation has the privilege against self-incrimination should be determined in reference to the test enunciated in *United States v. White,* 322 U.S. 694, 64 S.Ct. 1248, 88 L.Ed. 1542 (1944), that is, whether the organization has a "personal" character that represents the purely private or personal interests of its constituents, or whether it has such an "impersonal" character that it cannot be said to embody and represent such interests.

Since the decision of *Wild v. Brewer,* the United States Supreme Court in a number of decisions has both expanded the scope of the privilege against self-incrimination and has squarely held that the question whether an individual may claim the privilege does not turn upon any classification of the person seeking it. *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), *Johnson v. New Jersey,* 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966), *Garrity v. New Jersey,* 385 U.S. ....., 87 S.Ct. 616, 17 L.Ed.2d .....

(1967), and *Spevack v. Klein,* 385 U.S. ....., 87 S.Ct. 625, 17 L.Ed.2d ..... (1967), require the holding that the claim of fifth amendment privilege by a corporate officer and his related immunity under the antitrust laws should not be denied simply for the reason that he holds a particular occupational classification.

While the approach of these recent Supreme Court decisions is different from that taken in *Wild v. Brewer,* it is not necessary to overrule that decision to effectively protect the interest of the individual appellants here. *Wild v. Brewer* concerned an administrative subpoena under the Internal Revenue Code, rather than a subpoena issued in the course of an antitrust investigation. There is no similar immunity in the Internal Revenue Code to that provided by 15 U.S.C. secs. 32-33. Accordingly, in *Wild v. Brewer,* no issue existed as to possible limitations that might be placed upon the use of corporate records as to individual prosecutions. The original paragraph 3 of the district court's order achieved a workable compromise between the existing state of the law as to the lack of the corporate privilege against self-incrimination and the requirement that the privilege of individuals against self-incrimination be protected by directing that the corporate records be produced, but that their use be limited to investigating possible criminal activity on the part of Maricopa Tallow Works, Inc. The district court erred, however, in granting the motion of the Government to delete this paragraph from its original order.

While the original paragraph 3 of the district court's order adequately protects the interest of the individual appellants here, the corporate appellants urge that the Court reconsider the rule that the corporation does not have the privilege against self-incrimination. Where, as here, a corporation is closely-held and for all practical purposes repre-

sents the private or personal interests of its constituents, to say that the Government may obtain records from the corporation that may then be used to prosecute them is to give effect to a legal fiction that has outlived its usefulness. Under 15 U.S.C. sec. 24, the crimes of a corporation are the crimes of the individual officers who are responsible for the acts involved.

By claiming its privilege against self-incrimination, the corporation is best able to protect the individual interests of its officers, directors and shareholders. In view of the continuing recent development of the privilege against self-incrimination, to withhold the privilege from a closely-held corporation would be to impose an unrealistic and unnecessary condition upon the exercise of the privilege that is inconsistent with the *Miranda, Johnson, Spevack,* and *Garrity* cases cited above. For these reasons, it is submitted that as to the appellant corporations, the court should adopt the analytic, fact-oriented approach formulated in *United States v. White, supra,* and hold that they may assert the privilege as well.

ARGUMENT

I. Introduction.

As a matter of plain realism, if there is anything in the "corporate" records which would incriminate the corporation, then necessarily it also incriminates the people who are the corporation.[2] If therefore these records of the corporation are turned over, it is a plain and not very appealing legal fiction to say that the individuals are not incrimi-

2. 15 U.S.C. sec. 24 provides that a violation by a corporation of any of the penal provisions of the antitrust laws is deemed also that of the directors, officers, or agents who have authorized, ordered, or done any prohibited acts. Such conduct is punishable by a fine of up to $5,000 or by imprisonment for not exceeding one year, or both.

nated thereby. Of course they are; under the Government's interpretation of the fifth amendment and the immunity statutes, the individuals who are directly involved are, in every realistic sense, compelled to incriminate themselves without getting any immunity at all.[3]

We are not dealing here with some casual or merely utilitarian legal fiction, such as whether the South Sea Islands should be regarded as being in the center of London for purposes of venue.[4] The legal fiction with which we are concerned makes a difference. People can go to jail because of it. Because of its total unrealism, this fiction has been under attack, and there has been a developing body of law that it should be abolished; we should look at the matter truthfully, for what it is, and not allow the privilege against self-incrimination to be whittled away by this deviousness. A developing body of law gives ever broader scope to the fifth amendment. We invoke this developing body of law here.

II. The Subpoena Violates the Immunity of the Individual Appellants Under 15 U.S.C. Secs. 32-33 and Invades Their Privilege Against Self-Incrimination.

15 U.S.C. secs. 32-33 expressly provide that individuals have an immunity from prosecution for antitrust violations if they are compelled to testify or produce records in re-

---

3. The Government perfectly freely acknowledged in the district court that it seeks to circumvent the privilege in this fashion. In its memorandum in support of motion for modification of order, the Government admitted that "in most instances the government learns of individual antitrust violations as a result of inspection of corporate documents." (R. 41).

4. For a discussion of this and other legal fictions see Hancock, *In the Parish of St. Mary le Bow, in the Ward of Cheap,* 16 Stan. L.Rev. 561, 621 (1964).

sponse to subpoena.[5] The Government seeks to avoid the grant of that immunity by directing this subpoena solely to the appellant corporation and serving the subpoena upon its statutory agent. But the corporation is so closely held that if evidence of some wrongful activity should be found, it would necessarily and inescapably involve the individual officers, directors and shareholders. We do not have the situation presented by a large corporation, some of whose shareholders may not be directly involved in management. Here, any act charged against the corporation must necessarily also become an act charged against this small number of persons. In these circumstances, the immunity statute is evaded if the documents are taken without granting the individuals immunity who may personally be incriminated by a disclosure of their contents.

Wholly apart from the applicability of the special antitrust immunity statute the appellants seek relief by virtue of the self-incrimination clause of the fifth amendment. If any incriminating materials should be found, they would directly incriminate the individuals as much as the corporation.

These problems have most recently concerned this court in *Wild v. Brewer,* 329 F.2d 924 (9th Cir. 1964); see also

---

5. 15 U.S.C. sec. 32 provides:

"No persons shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under sections 1-7 of this title and all Acts amendatory thereof or supplemental thereto, and sections 8-11 of this title: Provided, That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying."

and 15 U.S.C. sec. 33 states:

"Under the immunity provisions in section 32 of this title, immunity shall extend only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or othewise, under oath."

Hyster v. United States, 338 F.2d 183 (9th Cir. 1964).[6] In *Wild v. Brewer* the issue was whether an officer of a closely held corporation could assert his privilege against self-incrimination in opposition to an administrative subpoena directed at corporate records. There the panel (Judges Merrill, Koelsch and Madden) first held that such a privilege could be asserted, Judge Koelsch dissenting. On rehearing, Judge Merrill reversed himself and joined Judge Koelsch. 329 F.2d 924. The original opinion was withdrawn and does not appear as such in the Reporter system.[7]

In the original opinion, Judge Madden, after outlining the facts turned to the principles involved. He began with a discussion of the development of the fifth amendment privilege itself, a discussion which is far more than "historical background." As in *Wild v. Brewer,* this case is to be determined fundamentally on the basis of the attitude which the Court takes toward the fifth amendment privilege. It is either serious business, to be carried to the full extent of its logic, or it is to be "cabin'd, cribb'd, [and] confined." We adopt without repeating it the full-scale statement of Judge Madden, adding only the most recent statements of the spirit in which the Supreme Court approaches this vital part of our Constitution.[8]

---

6. In *Hyster,* the corporation raised contentions on behalf of its officers similar to those asserted by the individual appellants here. The Court, however, declined to reach these contentions because the officers themselves were not before it. The officers of Maricopa Tallow are parties and their claims are properly here; the Government has not cross appealed from the district court's granting of their motion to intervene.

7. The original opinion, however, was published in CCH 1964 Stand. Fed. Tax Rep. ¶ 9348 before it was withdrawn. It appears at R. 13-17.

8. In *Miranda v. Arizona,* 384 U.S. 436, 458, 86 S.Ct. 1602, 1619, 16 L.Ed.2d 694 (1966), the Court referred to the privilege against self-incrimination as "one of our Nation's most cherished

Judge Madden then turned squarely to the issue of the case. As in the instant case, the individual claimed the privilege "for himself, and says that he, and not any artificial legal entity, will be the one to suffer the punishment if he is obliged to furnish to the Government the evidence which bring about his conviction." 329 F.2d at 927.

Judge Madden fully faced the obstacles to his conclusion. *Hale v. Henkel,* 201 U.S. 43, 26 S.Ct. 370, 50 L.Ed. 652 (1906) holds that the corporation may not in its own behalf claim the privilege. This is clearly distinguishable from the claim of the individuals, and Judge Madden put it aside. *Wilson v. United States,* 221 U.S. 361, 31 S.Ct. 538, 55 L.Ed 771 (1911) does without question hold that an individual custodian of corporate books may not decline to produce the books because they might incriminate him. See also *Grant v. United States,* 227 U.S. 74, 33 S.Ct. 190, 57 L.Ed 423 (1913).

Judge Madden believed that these cases were no longer controlling. He relied in part on *United States v. White,* 322 U.S. 694, 64 S.Ct. 1248, 88 L.Ed 1542 (1944), a case involving the highly analogous problem of production of labor union records. *White* distinguished the *Wilson* and

---

principles," tracing the privilege to the commentary of Maimonides, who stated that "[t]he principle that no man is to be declared guilty on his own admission is a divine decree." 384 U.S. at 458, n. 27. The Court held that the fifth amendment is "fundamental to our system of constitutional rule." 384 U.S. at 468. *Malloy v. Hogan,* 378 U.S. 1, 7, 84 S.Ct. 1489, 1493, 12 L.Ed.2d 653 (1964), recognized that the development of the privilege in state cases "reflects recognition that the American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay." And, in *Murphy v. Waterfront Comm'n,* 378 U.S. 52, 55-56, 84 S.Ct. 1594, 1596-97, 12 L.Ed.2d 678 (1964), the Court enumerated in detail the "fundamental values and most noble aspirations" behind the privilege, which it characterized, quoting *Ullman v. United States,* 350 U.S. 422, 426, 76 S.Ct. 497, 500, 100 L.Ed. 511 (1956), as "one of the great landmarks in man's struggle to make himself civilized."

Grant holdings by formulating a test, as to unincorporated organizations, of

> "[W]hether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only." 322 U.S. at 701.

Judge Madden found the solely-owned corporation to be one whose character was "personal" rather than "impersonal" and hence that the privilege should apply. We submit that the *White* test is applicable, that it should be applied to the present case, and that under that test, the privilege should be respected. Judge Madden relied upon the more recent cases expanding the privilege against self-incrimination and particularly upon *Ullman v. United States,* 350 U.S. 422, 76 S.Ct. 497, 100 L.Ed. 511 (1956). Judge Koelsch dissented briefly, finding the task of attempting to decide which were "personal" and which were "impersonal" holders of papers too difficult to be judicially feasible.

On rehearing, the earlier conclusion was reversed, Judge Merrill joined Judge Koelsch in the following one-sentence opinion:

> "Judgment affirmed on the authority of *Grant v. United States* (1912), 227 U.S. 74, 33 S.Ct. 190, 57 L.Ed. 423, and *Wilson v. United States* (1911), 221 U.S. 361, 31 S.Ct. 538, 55 L.Ed. 771." 329 F.2d 924, 925.

Judge Madden concluded his dissent on the rehearing:

> "The recent decisions of the Supreme Court, a few of which are *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963); *National*

Association for the Advancement of Colored People v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963); *Massiah v. United States,* 84 S.Ct. 1199 (1964), seem to me to make this court's decision in the instant case anachronistic." 329 F.2d at 929.

The problem of *Wild v. Brewer* was, concededly, marginal; this Court would not have had difficulty with it going first one way and then the other, if the question had not been genuinely troublesome; and so with the trial court in the instant case, which by odd parallelism has now ruled both ways on the underlying question.[9] But the doubts which existed in 1964 are largely set at rest by later judicial development. It is not useful to decide whether *Wild v. Brewer* was "anachronistic" as Judge Madden said in 1964, for clearly the rule it applies is indeed an anachronism today. The fundamental question is whether John Doe, citizen loses all of the fifth amendment rights worth having when he becomes John Doe, Inc. Legal developments subsequent to *Wild v. Brewer* resist any such conclusion.

---

9. Other courts have also had difficulty reconciling the established body of law concerning the corporate officer's lack of privilege with the more recent cases in closely related areas that have extended the privilege against self-incrimination. In *Hair Industry, Ltd. v. United States,* 340 F.2d 510, 511 (2d Cir. 1965), a case involving a claim of privilege by the sole owner of a corporation, the court found "some appeal" to the argument that the individual owner should be able to claim the privilege under the *White* principle, and that form should yield to substance, but felt itself bound by *Hale v. Henkel, supra.* And, in *Wright v. Detwiler,* 241 F.Supp. 753 (W.D.Pa. 1964), another case involving the claim of privilege by an officer of a family-owned corporation, Judge Willson recognized that "it may be that some of [the earlier] . . . decisions should no longer be followed in view of the present tendency to grant to individuals the widest protection under the . . . [Fourth and Fifth] amendments," but felt himself, as a district judge, bound by the existing rule.

For commentary critical of the result reached by the majority in *Wild v. Brewer,* see 78 Harv. L.Rev. 455 (1964); 49 Minn. L.Rev. 311 (1964); 39 N.Y.U.L. Rev. 1118 (1964); 51 Va. L.Rev. 143 (1965) (these comments are included in the record at R. 77-103).

This term the Supreme Court has decided three cases, *Garrity v. New Jersey,* 385 U.S. ....., 87 S.Ct. 616, 17 L.Ed.2d ..... (1967), and *Spevack v. Klein,* 385 U.S. ....., 87 S.Ct. 625, 17 L.Ed. 23 ..... (1967), and *Application of Gault,* (U.S. S.Ct. May 15, 1967) (not yet reported), which bear directly on the question of the claimed privilege by the individual officers and shareholders in the present case. In *Garrity* the Court reversed convictions based on statements obtained from defendant police officers who were told that if they refused to answer questions they would be subject to removal from office. In *Spevack,* the Court held that a lawyer who refused to honor a subpoena duces tecum served on him to produce financial records could not for that reason be disbarred, overruling *Cohen v. Hurley,* 366 U.S. 117, 81 S.Ct. 954, 6 L.Ed. 2d 156 (1961). In *Application of Gault* the Court held that the privilege against self-incrimination extends to juvenile proceedings, rejecting the argument that the privilege could be denied to persons having the status of juveniles, and focusing instead in a functional manner upon the nature of the statement given and the exposure it invites. These decisions have added an entirely new dimension to the scope of the privilege against self-incrimination.

These cases were prefaced by the landmark decision in *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966). While that case deals in a narrow sense with in-custody interrogation by police officers in a station house, broad statements were made concerning the privilege against self-incrimination that are also applicable here. In *Miranda* the Court held that "The privilege against self-incrimination secured by the Constitution applies to all individuals."

In a later passage in the *Miranda* opinion, the Court considered the "recurrent argument" that "society's need for interrogation outweighs the privilege" against self-incrimination. 384 U.S. at 479.

The Court categorically rejected that argument, holding flatly that "the Constitution has prescribed the rights of the individual when confronted with the power of government when it provided in the fifth amendment that an individual cannot be compelled to be a witness against himself. That right cannot be abridged." 384 U.S. at 479. These statements of the Court in *Miranda* were reinforced by the decision in *Johnson v. New Jersey,* 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966), which held that "our opinion in *Miranda* makes it clear that the prime purpose of these rulings [in *Escobedo* and *Miranda*] is to guarantee full effectuation of the privilege against self-incrimination, the mainstay of our adversary system of criminal justice." 384 U.S. at 729.

Following this broad enunciation of principles in *Miranda* and *Johnson,* the *Spevack, Garrity* and *Gault* cases have significance beyond the facts presented there. The thrust of these opinions is that by merely taking on a particular status, such as that of a lawyer or a policeman, the individual citizen does not thereby forfeit the privilege against self-incrimination that he formerly possessed as an individual. In *Spevack,* the Court held that the person who exercises this privilege should suffer no penalty for his silence, and that the definition of penalty is not restricted to fine or imprisonment. Following *Griffin v. State of California,* 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), the Court held that the assertion of the fifth amendment privilege may not be made costly to the person claiming it and, following *Miranda,* it held that:

> "In this Court, the privilege has consistently been accorded a liberal construction. . . . We find no room in the privilege against self-incrimination for classifications of people so as to deny it to some and extend

> it to others. Lawyers are not excepted from the words 'No person . . . shall be compelled in any criminal case to be a witness against himself'; and we can imply no exception. Like the school teacher in Slochower v. Board of Higher Education of City of New York, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692, and the policeman in Garrity v. State of New Jersey, 385 U.S. ....., 87 S.C. 616, 17 L.Ed.2d ....., lawyers also enjoy first-class citizenship." 87 S.Ct. at 628-29.

In *Garrity* the issue was whether statements obtained when the defendant officers were presented with a choice of self-incrimination or job forfeiture were admissible as evidence of guilt. Such pressure was held likely to " 'disable . . . [the officers] from making a free and rational choice, [citing *Miranda*],' " and that confessions obtained in such a manner "were infected by the coercion inherent in this scheme of questioning and [could] . . . not be sustained as voluntary." 87 S.Ct. at 618-19.

In the present case, the individual appellants have chosen to conduct their business in a corporate form. This choice, however, does not in any way depersonalize the personal concern they have had with the conduct of their business, the personal responsibility that they have for its successful management, and the criminal responsibility that they have for its violation of the antitrust laws. To hold that by choosing to do business in a corporate form an individual thereby waives his privilege against self-incrimination is to give him the choice "between the rock and the whirlpool," *Garrity v. New Jersey,* 87 S.Ct. at 619, and when that occurs, "duress is inherent in deciding to 'waive' one or the other." *Id.*[10] Under the reasoning of *Garrity* and *Spevack,*

---

10. See also *Frost v. Railroad Comm'n,* 271 U.S. 583, 46 S.Ct. 605, 70 L.Ed. 1101 (1926). For a general discussion anticipating the result in *Garrity* and *Spevack* see Note, *Unconstitutional Conditions,* 73 Harv. L.Rev. 1595 (1960).

appellants should not be required to forego doing business in a corporate form to retain their fifth amendment privilege, and, where they have undertaken business in this form, their privilege should be protected by limiting the scope in which the materials obtained from the corporation may be used. Corporate officers, in the same manner as lawyers, teachers, and policemen, should also be held to be "first-class citizens."

In its most recent decision, *Application of Gault,* (U.S.S.Ct. May 15, 1967) (not yet reported) the Court has extended the privilege against self-incrimination to juvenile court proceedings. In that case, the Court again refused to limit the scope of the privilege because of the status of the person claiming it, and specifically held that the privilege against self-incrimination is unequivocal, without exception, and comprehensive. The opinion holds:

> "It would indeed be surprising if the privilege against self-incrimination were available to hardened criminals but not to children. The language of the Fifth Amendment applicable to the States by operation of the Fourteenth Amendment, is unequivocal and without exception. And the scope of the privilege is comprehensive.
>
> ". . . It is also clear that the availability of the privilege does not turn upon the type of proceedings in which its protection is invoked, but upon the nature of the statement or admission and the exposure it invites . . .
>
> ". . . It would be entirely unrealistic to carve out of the Fifth Amendment all statements by juveniles on the ground that these cannot lead to 'criminal' involvement . . .
>
> ". . . [O]ur Constitution guarantees that no person shall be 'compelled' to be a witness against himself when he is threatened with deprivation of his liberty—a command which this Court has broadly applied and generously implemented in accordance with the teach-

ing of the history of the privilege and its great office in mankind's battle for freedom . . .[11]

"We conclude that the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults." 27 U.S.S.Ct. Bull. B. 1677, 1720-28.

All of the reasons given by the Court in *Gault* for extending the privilege against self-incrimination to juveniles apply equally to corporate officers. This most recent opinion gives further confirmation of the trend of the recent Supreme Court decisions that have made the holdings in *Wilson v. United States, supra,* and *Grant v. United States, supra,* obsolescent and of appellants' contention that no exceptions may be carved out of the broad protections afforded by the fifth amendment.

In order for this Court to reach the result required by *Spevack* and *Garrity* with respect to the protection of the individual privilege against self-incrimination in the context of an antitrust prosecution, it is not necessary to overrule *Wild v. Brewer.* That decision may be distinguished for the following reasons. *Wild v. Brewer* concerned an administrative subpoena under 26 U.S.C. sec. 7602. The Internal Revenue Code provides no immunity similar to that provided by 15 U.S.C. sec. 32-33 for corporate officers who produce corporate records in response to such a subpoena. Therefore, in *Wild v. Brewer,* the question presented was whether the taxpayer's records must be produced under any and all circumstances, without limitation as to use. Because of the absence of any immunity statute similar to 15 U.S.C. sec. 32-33, there was no issue in the case of limita-

---

11. See, *e.g., Miranda v. Arizona,* 384 U.S. 436 (1966); *Garrity v. New Jersey,* 385 U.S. 493 (1967); *Spevack v. Klein,* 385 U.S. 511 (1967); *Haynes v. Washington,* 373 U.S. 503 (1963); *Culombe v. Connecticut,* 367 U.S. 568 (1961); *Rogers v. Richmond,* 365 U.S. 534 (1961); *Malloy v. Hogan,* 378 U.S. 1 (1964); *Griffin v. California,* 380 U.S. 609 (1965). (Footnote by the Court).

tions that might be put upon the use of the records required to be produced.

In the present case, however, the fifth amendment privilege of the individual officers, directors and shareholders would be to a large extent protected by a limitation on the use to which the corporate records might be put, in the manner prescribed by the original order of the district court. This order required that the corporate records be produced. To that extent, it is not inconsistent with *Wild v. Brewer*. But the order further provided that:

> "[T]hese materials may only be used for purposes of investigating possible criminal activity on the part of Maricopa Tallow Works, Inc. and may not be used for the purpose of investigating any possible criminal activity on the part of any of the above named individuals [the individual appellants here]." (R. 35-36)

As noted in the Statement of Facts portion of this brief, at the time of the argument on the motion to quash appellants urged, the Government conceded, and the court agreed that the proposed limitation on the use to which the corporate records might be put was not within the scope of *Wild v. Brewer,* and that this limitation could be placed upon such use consistent with that decision.

The original paragraph 3 of the district court's order achieved a workable compromise between the existing state of the law as to the lack of corporate privilege against self-incrimination and the requirement that the privilege of individuals against self-incrimination be protected. Further, the original paragraph 3 of the district court's order is not inconsistent with *Wild v. Brewer,* and for that reason, in the event that this Court holds that the corporation itself does not possess a privilege against self-incrimination, appellants respectfully submit that the third paragraph of this order should be reinstated.

III. The Subpoena Should Be Quashed Because It Invades the Corporation's Privilege Against Self-Incrimination.

Appellants are aware of substantial authority as to the applicability of the privilege against self-incrimination to corporations. They nonetheless present this phase of the matter to perfect their record. They expressly challenge the soundness of the authority of the cases of *Hale v. Henkel,* 201 U.S. 43, 26 S.Ct. 370, 50 L.Ed. 652 (1906); *Wilson v. United States,* 221 U.S. 361, 31 S.Ct. 538, 55 L.Ed. 771 (1911), and the cases following them to the extent they hold that a closely-held corporation does not have such a privilege, for the reason that such holdings represent a hostile interpretation of the privilege against self-incrimination that is out of keeping with the broad policy considerations that were responsible for its formulation and enactment. See generally *Ullman v. United States,* 350 U.S. 422, 76 S. Ct. 497, 100 L.Ed. 511 (1956); *Wilson v. United States,* 221 U.S. 361, 392, 31 S.Ct. 538, 55 L.Ed. 771 (1911) (dissenting opinion of Mr. Justice McKenna); *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 1619-21, 16 L.Ed. 2d 694 (1966). The Court is urged to reconsider this authority and to hold that the privilege against self-incrimination should extend to a closely-held corporation such as Maricopa Tallow Works, Inc. applying the test formulated in *United States v. White,* 322 U.S. 694, 64 S.Ct. 1248, 88 L.Ed. 1542 (1944), of whether the corporation embodies or represents the private or personal interests of its constituents or whether it embodies only their group interests in an impersonal way. For a recent case applying and articulating the *White* test as related to a closely-held partnership, see *United States v. Cogan,* 257 F.Supp. 170 (S.D.N.Y. 1966).

In view of the *Spevack* and *Garrity* decisions, the question of whether a closely-held business operates in corporate form so as to deny the privilege against self-incrimina-

tion to its officers and shareholders is no longer the controlling inquiry. *Miranda* and *Johnson* stand for the principle that a fully effectuated privilege against self-incrimination extends to all individuals. *Spevack* and *Garrity* together hold that merely by assumption of a particular occupational status a person does not thereby relinquish his privilege against self-incrimination, and that a person who has chosen a particular occupation does not thereby become a second-class citizen under the Constitution. Such a result in a federal prosecution would be in conflict with the due process clause of the fifth amendment. *Cf. Bolling v. Sharpe,* 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954). As pointed out by Judge Madden in *Wild v. Brewer.*

> "[T]he impliedly reserved visitatorial power of the state which created the artificial legal entity, which power somehow is transferred to the Federal Government, seems to me to be something of a make-weight in the cases in which it has been expressed. And I think that the argument that one who incorporates his business has only himself to blame if he thereby forfeits Constitutional rights is not of Constitutional weight." 329 F.2d at 928.

When the above recent Supreme Court cases are taken together with 15 U.S.C. Sec. 24, which makes the crimes of a corporation the crimes of the individual officers who are responsible, and with the realization that any fine or penalty paid by a corporation must necessarily ultimately be paid by the responsible officers and shareholders, the reasons previously given for refusing the privilege of self-incrimination to closely-held corporation should no longer be controlling. Not only does the corporation have an interest in asserting the privilege on behalf of its officers, it has the interest on its own behalf of asserting the privilege, since by doing so the greatest protection is afforded to the

individual officers, directors and shareholders; for fifth amendment purposes, it is the officers, directors, and shareholders. To say that the creation of an artificial entity for the purposes of doing business thereby forfeits the privilege against self-incrimination that the entity and responsible individuals would otherwise have is to impose an unrealistic and unnecessary condition upon the exercise of the privilege that is inconsistent with *Miranda, Johnson, Spevack,* and *Garrity.* For these reasons, it is submitted that *Hale v. Henkel, Wilson v. United States,* and the cases following them should no longer be deemed controlling by this Court, and that the Court instead should adopt the analytic, fact-oriented, approach formulated in *United States v. White, supra,* as applied to closely-held corporations.

CONCLUSION

It is respectfully submitted that the decision of the court below should be reversed.

Lewis Roca Scoville
Beauchamp & Linton
By John P. Frank
John J. Flynn
Paul G. Ulrich
Attorneys for Appellants

May, 1967

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Paul G. Ulrich